SUPREME COURT
OF THE
UNITED STATES

Nos. 630 and 631

JAMES B. DILLINGHAM, as President; SYLVANUS B. NYE, as Vice-President; FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them as Trustees of the MUTUAL BENEFIT LEAGUE OF NORTH AMERICA, operating under an agreement and declaration of trust,

Plaintiffs-Appellants and Cross-Appellees,

vs.

GEORGE V. McLAUGHLIN, as Superintendent of Banks of the State of New York, and CARL SHERMAN, as Attorney General of the State of New York,

Defendants-Appellees and Cross-Appellants.

REPLY BRIEF FOR APPELLANTS

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SUBJECT INDEX.

LIST OF CASES

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SUPREME COURT

of the

UNITED STATES

Nos. 690 and 691

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-vs.-

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REPLY BRIEF FOR APPELLANTS

THE BRIEF OF ARGUMENT OF DEFENDANTS AND APPELLANTS:

The points of opposing brief in what appears to be their logical, but not the numerical, order, which will be preserved, briefly stated, urge:

II. That the plaintiffs business is banking as the conception of that business has been developed.

I. That the State has a right to deny natural persons the right to engage in banking and to limit the kind of banking business that may be done by corporations (although the plaintiffs are not incorporated).

III. The New York statute under consideration in the instant case constitutes a reasonable regulation under the police power.

IV. The plaintiffs' business partakes of the elements of gambling and of a lottery, and depends upon the folly of the ignorant, inexperienced and credulous.

V. The Court below erred in enjoining defendants from prosecuting the plaintiffs and enforcing the statute against them as to contracts entered into on or before June 25, 1923, the date when the Act took effect.

VI. The Court, if it rejects the preceding statements or points, should deny an interlocutory injunction until there is a trial of the case and the defense has made its case.

Taking up these points in the order in which they are named above, it may be said that they are fully met in the original brief of the plaintiffs, and but little more need be added to emphasize the position of plaintiffs. It is not the fault of counsel for plaintiffs that a more elaborate review is not here made of the authorities cited by defendants and cross appellants in their brief, but their brief was recently served in a fragmentary condition, with the proof sheets served later, and was filed March 10th, 1924, upon the threshold of the calling of the docket of this Court. Briefly considering these points in the opposing brief, and taking them in the order we have placed them, it may be said:

II. As to the second point, that the business of plaintiffs is a banking business as that occupation has been developed, it is sufficient to say that if the plaintiffs as trustees of a common law trust are bankers and governed by the statute relating to banking, then there is a pronounced and invidious discrimination in the act itself between large and small transactions, as the act under consideration applies to all persons therein named, and is sweeping in its character, so far as the title of the amendatory section sets forth the in-

tent and object of the legislature, and that is:

> "174 (The added section) Prohibitions against encroachment by individuals as trustees or otherwise upon certain powers of private bankers, of saving banks or savings and loan associations."

Then follows the section in full, which prohibits any individual, either for himself or as trustee, a partnership or unincorporated association, from engaging in the business of receiving money or payments of money in installments, for co-operative, mutual loan, savings or investment purposes in sums less than five hundred dollars each, and soliciting for the same, is also prohibited; and from the loaning of money by such persons similar to such savings bank and mutual loan associations, in less than said sum of five hundred dollars. The act makes a clear distinction between banks and savings banks and the other kinds of business mentioned therein, as ordinary banks of issue and discount and private bankers, are not mentioned at all in the body of the section, as in its caption or title, which, however, shows the intent and object of the act, under the guise of the police power, to prevent encroachment by individuals upon certain powers (what powers?) of private bankers, savings or savings and loan associations. The act itself shows that it does not mean general bankers, but is confined to certain individuals, associations and unincorporated bodies. The act speaks for itself, awk-

wardly and unconstitutionally, to prevent encroachments on powers of certain persons named.

The plaintiffs' business cannot be banking, as it would not "encroach" upon its own powers, and then it does not fall upon the general terms and meaning either of the section or of the banking act itself. Furthermore, neither by any distorted or garbled decisions of courts of last resort, nor by any process of logical reasoning, can it be said that these plaintiffs have ever been or are now engaged in a banking business.

As to Point I, that the State has the right to deny natural persons the right to engage in the banking business, that is not questioned and need not be questioned in the instant case, as it is clear that plaintiffs do not fall in the category of private bankers, and, of course, are not governed by such decisions, nor by the laws or rules relating to private bankers or the business of banking as commonly known and as generally understood, and as defined in the banking law, of which the section 174 under consideration is added as a new section.

As to Point III, we have fully considered that in the original brief, but it may well be supplemented by a few observations. It is contended by the opposing brief, that the New York statute, section 174, constitutes a reasonable regulation under the police power. This is really the crux of the situation.

The act is not a regulation; it is an absolute prohibition of business such as that of plaintiffs and was undoubtedly directly aimed at them as the ear marks of the caption of the section disclose. It is an absolute prohibition of their business and that is the result aimed at here.

The defendants have cited the case of Engle v. O'Malley, et al., 219 U. S., 128. 138, to show that the discrimination in the act as to the amount of the preliminary loan and deposit to which the prohibition extends, is an exercise of the police power, but the object of the law was there entirely different from the object and intent of the act under consideration here. An extract from the opinion in that case discloses that line of demarcation between that case and the instant case:

> "But the former of these exceptions has the manifold purpose to confine the law as nearly as may be to the class thought by the legislature to need protection. * * * * Legislation which regulates business may well make distinctions depend upon the degree of evil. Heath v. M. Mfg. v. Worst, 207 U. S., 338, 355, 356. It is true, no doubt, that where size is not an index to an admitted evil, the law can not determinate between the great and the small. But in this case, size is an index. Where the average amount of each sum received is not less than $500, we know that we have not

> before us the class of ignorant and helpless depositors, largely foreign, whom the law seeks to protect."

The instant case is entirely different from the circumstances disclosed in the gestation of the act and the law under consideration.

The scheme of the act here is to bar out of business every unincorporated association from doing business if he seeks to take a deposit or make a loan less than five hundred dollars, no matter how favorable the circumstances may be, nor how beneficial to the depositor or borrower.

Under the guise of encroachment on and of certain "powers" of some highly privileged persons, natural or artificial, who desire the pound of flesh and wish no competition in their exploitation, this obnoxious section was passed, making these marked distinctions between corporations and individuals and discriminating between the poor man that needs a home and the one who is able to furnish in one installment, the respectable sum of five hundred dollars. So with a loan of less than that sum. In addition to the objections stated in the original brief of plaintiffs, to this discrimination, as well as to the class discrimination, requires that the act should be denounced as unconstitutional.

See Bank of Augusta case 13 Peters 583

The police power is described as Law of Necessity.

Chicago v. Washington Home, 289 Ill., 206, 6 A. L. R., 1584;

State v. Starkey, 112 Me., 8, Ann. Cas. 1917 A. 196;

Randall v. Patch, 118 Me., 303, 8 A. L. R., 65;

Streich v. Board of Aldermen, 34 S. D., 169, Ann. Cas., 1917 A. 760.

The boundary line which divides the police power of the State from the other functions of government is often difficult to discover, and the limitations of power have never been drawn with exactness. It has been repeatedly said that it is much easier to perceive and realize the existence of the power, than to mark the boundaries and prescribe limits to its exercise.

6 R. C. L., 184, 185.

The courts have been unable and unwilling definitely to circumscribe it, but instead have determined as each case is presented, whether it falls within or without the appropriate limits.

6 R. C. L., 189.

There are limitations, however, to the police power, and an unreasonable invasion of private rights or impairment of the rights of property guaranteed by the

Constitution, under the guise of the police power, will not be sustained.

Schiller Piano Co. v. Illinois Northern Utilities Co., 288 Ill., 680, 11 A. L. R., 454, 457.

It has been found impossible to frame, and it is, indeed, deemed inadvisable to attempt to frame, any definition of the police power which shall absolutely indicate its limits by including everything to which it may extend and excluding everything to which it cannot extend, the courts considering it better to decide as each case arises whether the police power extends thereto, the power being coextensive with the necessities of the case and the safeguards of the public interest. (12 C. J., 908).

The police power is the gradual process of inclusion and exclusion.

Chicago, B. & Q. R. R. Co. v. State, 47 Neb., 549, 53 Am. St. Rep., 55.

The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action is a mere excuse for an unjust discrimination, or the oppression or spoilation of a particular class.

Holden v. Hardy, 169 U. S., 366, 398, approved in Dobbins v. Los Angeles, 195 U. S., 233, 236.

See:

60 L. ed. U. S. Sup. Court Rep., 348, Ann. Cas., 1917, B. 927, L. R. A., 1917 B. 1248.

The exercise of the police power must not be unreasonable, and statutes thereunder must be enacted in good faith for the promotion of the public good, and *not for the oppression or annoyance* of a particular class.

State v. Gurry, 121 Me., 534, 47 L. R. A. (N. S.) 1087, Ann. Cas., 1915 B. 957.

See:

State v. Smith, 233 Mo., 242, 33 L. R. A. (N. S.) 179;

Enos v. Hauff, 98 Neb., 245;

People ex rel Wineburgh Adv. Co., 195 N. Y., 126;

O. J. Gude Co. v. Same, 195 N. Y., 225.

The police power is founded on public necessity and only public necessity can justify its exercise.

Spann v. City of Dallas, 11 Tex., 350, 235 S. W., 513.

An act providing that farmers shall not be subject to combinations creating monopolies was held to be unconstitu-

tional, as denying equal protection of the laws.

Buffalo Gravel Corporation v. Moore, 194 N. Y., 225.

Under Const., Art. 1, Sec. 23, a classification of subjects to be valid legislation must be based on substantial distinctions, which make one class so different from another as to suggest the necessity of different legislation with respect thereto, and an artificial, arbitrary and unreasonable classification, as by designating certain individuals by name or description out of a larger number whose situation and needs do not differ from them, is forbidden.

Davis Coust. Co. v. Board of Com'rs of Boone Co., (Ind.) 132 N. E. 629.

Classification must be natural and reasonable and not arbitrary or capricious, and the legislation must extend to and embrace accurately all persons who are or may be in like circumstances.

State v. Bartels, 191 Iowa. 1060, 181 N. W., 508.

See:

City of Xenia v. Schmidt, (Ohio) 130 N. E., 24.

No exercise of the police power can override the demands of natural justice.

People v. Chicago, M. & St. P. Ry. Co. (11). 138 N. W., 155.

Burns Ann. St. 1914, sections 10435-14037 prohibiting trade marks on bottles, etc., but not upon earthenware, jugs, pasteboard crates, etc., violates State Constitution, Art. 1, Sec. 23, guaranteeing equal privileges and immunities to all citizens.

State v. Wiggam, (Inc.) 118 N E., 684.

Statutes applicable to all members of a class are not invalid, if the acts declared unlawful *are peculiar to it.*

State v. Justus, 85 Minn., 279, 89 Am. St. Rep., 550;

State v. Sharpless, 31 Wash., 191, 96 Am. St. Rep., 893.

Class legislation is that which makes improper discriminations by conferring privileges on a class arbitrarily selected from a large number of persons standing in same relation to privileges without reasonable distinciton or substantial difference.

Mono Power Co. v. City of Los Angeles, 33 Cal. App., 166 P. 387.

The test of unlawful statutory discrimination is whether all who are similarly situated are similarly treated, and whether those who are similarly situated are hindered to make competition with one another.

St. P. & S. S. M. Ry. Co., 34 N. D., 418, 158 N. W., 1004.

Ohio "blue sky" law was held to deprive dealers in securities of property of the right to pursue a lawful calling without due process of law.

Guger-Jones Co. v. Turner, supra.

Generally, no one may be subject to any greater burdens and charges that are imposed on others in the same calling or condition, or in like circumstances, and no burden can be imposed on one class of persons, natural or artificial, which is not, in like conditions, imposed on all other classes.

State v. Savage, (Oregon), 184 Pac. Rep., 567, rehearing denied 189 Pac. Rep., 467.

In the opinion in the last cited case, the following is important as defining the limitations of the police power:

If the statute applies only to one class of persons and imposes upon them duties not common to others, there must exist in the relations to (of) such persons to the state, to the public or to individuals, some reasonable ground of distinction sufficient to show that the classification is not merely personal and arbitrary, else there will be a denial of the equal protection of the law. (Many cases cited).

The general principle seems to be that if legislation, without good reason and just basis, imposes a burden on one class which is not imposed on others in like circumstances or engaged in the same business, it is a denial of the equal protection of the laws to those subject to the burden and a grant of immunity to those not subject to it. Particular laws granting special privileges and immunities must run the gauntlet of both the provisions of the Fourteenth Amendment to the Federal Constitution, which secures the equal protection of the laws, and those of the State Constitution, which prohibit the enactment of special laws granting privileges and immunities. The tests as to both are substantially similar. Also, the inherent limitations on legislative power may themselves be

> sufficient to nullify such laws. The provisions of the State Constitution are the antithesis of the Fourteenth Amendment in that they prevent the enlargement of the rights of some in discrimination of the rights of others, while the Fourteenth Amendment presents the curtailment of rights. 6 R. C. L., sec. 400, p. 406; 12 C. J., sec. 827; p. 1111; Cooley's Const. Lim. p. 561, et seq.; State v. Nashville etc., R. H. Co., 124 Tenn., 1, 135 S. W., 773. Ann. Cas., 1912 D. 805.
>
> *State v. Savage*, (Oregon), 184 Pac. Rep., 567, rehearing denied, 189 Pac. Rep., 467.

It is clear from these quotations, including the views of this Court, that each case stands on its own bottom, and is to be decided from the text, context, and the manifest intent and object of the legislature.

The discriminations in the act are unreasonable, arbitrary, capricious and even vicious, the act being clearly a singling out of the enterprise of the plaintiffs as if named therein, and all building and loan associations based upon small or moderate monthly installments, with the plain intent and purpose of driving them out of business, and with the avowed and express purpose of protecting private bankers. The size of the prohibition is an index to the intent and object of the

act, and is unreasonable and arbitrary, and it places deposits and loans wholly within the power of the banking interests. Furthermore, the business of the plaintiffs would be ruined if the act is held constitutional. It can not carry out even its past contracts successfully. With the large and increasing business of plaintiffs, and with no complaint from its patrons, it has demonstrated that its enterprise is deemed beneficial and would be beneficial to all. "That no complaint has even been received from any contract owner since the commencement of plaintiffs' business to date," as testified by the treasurer (Transcript of Record, page 44), in his affidavit is apparently not disputed, and this is proof of the benefits conferred upon the various contract owners and their satisfaction with their investments. This business can not be destroyed by legislative abolition.

> The legislature may not, under the guise of the police power, impose on property burdens so excessive as to work a confication thereof.
>
> Nor may such power be used in any way as a cloak for the invasion of personal rights or private property; neither may it be exercised for private purposes, nor for the exclusive benefit of particular persons or causes.
>
> 12 C. J., 930.

But if the enjoyment of private property must be held subordinate to such reasonable regulations as are essential to the peace, safety, order and morals of the community, yet under the guise of enactments for its protection lawful property cannot be confiscated. (Cases cited).

Dungin v. Minot, 203 Mass., 26, 133 Am. Rep., 276, 278.

Vested rights cannot be destroyed by the Legislature.

Lamont v. Vinger, 61 Montana, 530, 202 Pac. Rep., 769.

A statute which has the effect of restricting the use and possession of personal property owned by a citizen, confiscates such property within the purview of the Fifth Amendment to the Federal Constitution.

Corelli v. Moore, 267 F. 436.

A statute to be valid under the police power must bear a substantial relation to the existing evil, and not be a mere attack on property rights, disguised as an exercise of the police power.

The general rule, at least, is that while property may be regulated to a certain

extent, if regulated goes too far, it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration go— and if they go beyond the general rule, whether they do not stand upon as much tradition as principle.

Pennsylvania Coal Co. v. Mahon, 43 Sup. Court, 154, 158, 67 L. ed. 154.

The owner of property cannot be divested of it, except by his consent or in the manner provided by law.

Mozny v. Coleman, (Okl.,) 212 Pac. Rep., 431.

Discrimination established by statutory classification must be rational in scope and effect, and bear some manifest relation to the main object sought to be accomplished thereby.

Long v. Co-operative League of America (Mass.) 140 N. E., 811.

In the last cited case, it appears that the Massachusetts statute prohibiting any person from issuing or selling bonds or other obligations redeemable in numerical order, was held valid, but no such statute is before the Court for consideration. It was not enacted in New York for some reason, and is not applicable here, but the police

power was rather badly strained by the Massachusetts court in its decision. If the New York Legislature had seen fit to enact such a questionable statute, a different question would be presented, but it appears that no such law was considered, evidently because it would have embraced within its sweeping provisions, the "great and the small", which would have defeated the "protection" to bankers and others of the privileged class, sought by the act.

> The prohibition or test in a regulation under the police power, of a lawful profession or occupation rendering service to the public, should be with reference to the object to be attained, and should not unduly interfere with private business, or impose unusual or unnecessary restrictions.
>
> *State v. Board of Medical Examiners*, (Ala.) 95 So. 295.

> Private contracts concerning property rights are inviolable. Const. U. S., art. 1, sec. 10, Const. Maine, art. 1, sec. 11.
>
> *In Re Guilford Water Company's Service Rates*, (Me.) 108 Atlantic Rep., 449.

Two legal maxims are the basis of the police power: *Sic utere tuo ut alienum non laedas*, and

salus populi suprema lex est. Neither of these maxims apply to the statute under the circumstances.

As to Point IV of the opposing Brief of Argument, that the enterprise is a lottery, that has been fully gone into in plaintiffs' original brief.

As to the calculation of the Honorable Attorney General, attempting to show the elements of chance, we submit that the affidavit of James B. Dillingham, one of the plaintiffs sufficiently answers that contention, which was anticipated, and we hope was fully met in our original brief. (Transcript of Record p. 73 et. seq.).

Point V, is matter of cross appeal. The Court enjoined all prosecutions under the act, for matters occurring before the act took effect.

This is the usual rule where no harm can be done by injunctive relief, but here, the contracts of plaintiffs prior to this legislation, can not be successfully carried out and, moreover, its business would be utterly destroyed, and the vested rights of the contract holders as well as the property of the plaintiffs would suffer irreparable damage and loss, under their contracts.

Point VI urges that an interlocutory injunction should be denied by this Court prior to a full hearing, but in that case, equity could not be done, and

the business of the plaintiffs and the right of their contract holders would suffer irreparable injuries, loss and damage from a multiplicity of suits, both civil and criminal, as should suit the views of the defendants or some of them.

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